

**Lucile Salter Packard Childrens' Hospital at Stanford and American Federation of State, County and Municipal Employees, District Council 57, American Federation of State, County and Municipal Employees, AFL-CIO. Case 32-CA-13740**

August 21, 1995

**DECISION AND ORDER**

BY MEMBERS STEPHENS, BROWNING, AND  
TRUESDALE

On December 29, 1994, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

The Respondent is engaged in the operation of an acute care pediatric hospital located in Palo Alto, California. In the beginning of January 1994,<sup>2</sup> the Union commenced an organizing campaign among nurses at the Hospital. On February 14, Union Representative Linda Kahn visited the Hospital to distribute union literature. When she sought to set up a table in the hallway outside the Hospital's public cafeteria, she was informed by Ellen Michelfelder, the human resources vice president, that it was against the Hospital's policy for a nonemployee to engage in solicitation on its property.<sup>3</sup> Thereafter, the Union was not permitted to engage in organizing activity in the Hospital.

The judge concluded that the Respondent violated Section 8(a)(1) of the Act by enforcing its ban on union solicitation in a discriminatory manner. The judge found that the Respondent has an established practice of permitting nonemployees to set up tables or booths in the hallway adjacent to the cafeteria to solicit and sell goods and services. The judge noted that nonemployee representatives are permitted to solicit tax-sheltered annuity and health care insurance plans, and that those plans are related to the Respondent's fringe

benefits package offered to its employees. The judge also noted that medical textbook vendors are allowed to sell their products in the Hospital as part of the Hospital's educational enhancement practice.

The judge found that the Respondent also regularly permits the Stanford Federal Credit Union, a Child and Family Services representative, and a California Casualty property insurance representative to set up tables outside the cafeteria for solicitation and distribution of information. The judge noted that these products are not a part of the employees' regular benefit package.

Finally, the judge noted that a flower vendor, two jewelry vendors, and a clothing vendor are authorized by the Packard Employee Activity Committee (PEAC)<sup>4</sup> to sell their wares near the cafeteria. The judge found that although the vendors must remit a percentage of their proceeds to PEAC in exchange for authorization, this did not negate the fact that such solicitation is inconsistent with the plain language of the Respondent's written policy of precluding solicitation by nonemployees. Accordingly, relying on the presence of the PEAC-authorized vendors and the commercial vendors offering products and services that are not part of the employees' regular benefit package, the judge found that the Respondent applied its no-solicitation and distribution policy in a selective manner.<sup>5</sup>

We agree with the judge that the Respondent discriminatorily enforced its policy on union solicitation. The record shows that on a regular basis the Respondent permits nonemployee commercial organizations to solicit and distribute materials in the hallway near the cafeteria. Although the Respondent contends that the nonemployee vendors and representatives are agents acting on behalf of the Respondent and in furtherance of its business, the record shows that these entities are not agents of the Respondent nor an integral part of the Hospital's necessary functions.

We also find that this case is distinguishable from the cases cited by the Respondent, *Rochester General Hospital*, 234 NLRB 253 (1978), and *George Washington University Hospital*, 227 NLRB 1362, 1374 fn. 39 (1977), because in those cases the solicitation that did not constitute evidence of disparate treatment was an integral part of the employers' health care functions and responsibilities.<sup>6</sup> Here, by contrast, the Respondent

<sup>1</sup> We disavow fn. 3 in the judge's decision, which characterizes a union contract as a form of insurance protection that labor organizations are in business to provide.

<sup>2</sup> All dates are in 1994, unless stated otherwise.

<sup>3</sup> The Respondent's no-solicitation and distribution policy, set forth in its supervisor's manual, states that persons not employed by the Hospital may not solicit or distribute literature on the Hospital's property for any purpose at any time. Employees also may not solicit for any purpose during working time, or distribute material for any purpose during working time or in working areas.

<sup>4</sup> PEAC is a committee composed of employees and hospital administrators that acknowledges major events in the lives of the employees and their families.

<sup>5</sup> The judge noted that the parties also presented evidence concerning the Respondent's alleged cooperation with the Committee for Recognition of Nursing Achievement during the committee's 1991 organizational campaign. The judge concluded that it was unnecessary to analyze this evidence because the campaign was remote in time and appeared to be of limited evidentiary value. No party objected to the judge's finding.

<sup>6</sup> In *Rochester General Hospital*, the Board found that displays of posters and blood collection by the Red Cross for the hospital blood

*Continued*

permitted various commercial organizations to solicit sales of products such as insurance other than health care and jewelry that are neither related to the hospital's health care function or, as discussed by the judge, part of the employees' regular benefit package. See generally *D'Alessandro's, Inc.*, 292 NLRB 81 (1988).

The Board has recognized that an employer does not violate Section 8(a)(1) by permitting a small number of isolated "beneficent acts" as narrow exceptions to a no-solicitation rule. *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982).<sup>7</sup> In *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995), denying enf. in pertinent part 313 NLRB 1275 (1994), the court, citing *Hammary Mfg.* with approval, found that the employer did not act unlawfully by refusing to permit the union to post announcements about organizational meetings on the company's bulletin boards where the employer permitted only limited postings about sale items and did not allow the posting of any general announcements about meetings. The court distinguished *Riesbeck Food Markets*, 315 NLRB 940, 941 (1994), in which the Board relied on the judge's finding that the employer permitted "all kinds of civic and charitable solicitation on its property for a total of almost two months a year" to conclude that the employer's refusal to permit union solicitation of its customers was discriminatory. Here, as in *Riesbeck*, the record shows that the Respondent regularly allowed various commercial entities to solicit their wares and services to employees despite its no-solicitation policy.<sup>8</sup> See also *Be-Lo Stores*, 318 NLRB 1 (1995). Accordingly, we adopt the judge's findings that the Respondent violated Section 8(a)(1) by discriminatorily precluding union organizational solicitation while sanctioning other solicitation.

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Lucile Salter Packard Chil-

bank, sales by a volunteer group that donated proceeds to the hospital, and displays of pharmaceutical products and medical books were work-related activities that assisted the hospital in carrying out its community health care functions, and not evidence of disparate treatment as to require the employer to grant access to nonemployee union organizers. Similarly, the Board in *George Washington University Hospital* adopted the judge's finding that "white elephant sales" and sales by the Women's Board were an integral part of the hospital's necessary functions.

<sup>7</sup>Member Browning finds it unnecessary to pass on the continuing validity of the "isolated beneficent act" exception established in *Hammary Mfg. Corp.*

<sup>8</sup>Member Stephens, who dissented in *Riesbeck*, finds it distinguishable from this case. He viewed the respondent there as acting pursuant to a nondiscriminatorily enforced rule against any solicitation or distribution by any group that urged patrons not to patronize the respondent. No such evenhanded application of a rule exists in this case.

drens' Hospital at Stanford, Palo Alto, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Patricia M. Milowicki, Esq.*, for the General Counsel.

*Laurence R. Arnold (Weissburg & Aronson)*, of San Francisco, California, for the Respondent.

### DECISION

#### STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Oakland, California, on August 18, 1994. The charge was filed on February 16, 1994, by American Federation of State, County and Municipal Employees, District Council 57, American Federation of State, County and Municipal Employees, AFL-CIO (the Union). On March 28, 1994, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing, alleging violations by Lucile Salter Packard Childrens' Hospital at Stanford (the Respondent or the Hospital) of Section 8(a)(1) of the National Labor Relations Act. In its duly filed answer to the complaint, the Respondent denies that it has committed the unfair labor practices as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel and counsel for the Respondent. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent is a California corporation engaged in the operation of an acute care pediatric hospital and facility located in Palo Alto, California. In the course and conduct of its business operations, the Respondent annually derives gross revenues in excess of \$250,000, and purchases and receives goods and services valued in excess of \$50,000 directly from suppliers located outside the State of California. It is admitted, and I find, that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Issues*

The principal issue in this proceeding is whether the Respondent has engaged in a violation of Section 8(a)(1) of the Act by refusing to permit nonemployee representatives of the Union from distributing union literature in a hallway area adjacent to the Hospital's cafeteria.

### B. *The Facts*

In the first part of January 1994,<sup>1</sup> the Union commenced an organizing campaign among the nurses at the Hospital. On February 14, Linda Kahn, a union representative, sought to set up a table in the hallway outside the Hospital's public cafeteria in order to distribute union literature. Kahn was approached by Ellen Michelfelder, vice president of human resources, who told her that it was against hospital policy for a nonemployee to engage in such activity on hospital premises. Thereafter, the Union was not permitted to engage in organizing activity, and as a result the Union filed the instant charge.

Set forth in the Hospital's supervisor's manual is the following section:

#### C. Solicitation and distribution of literature on Hospital property

In order to prevent disruption in the operation of the hospital, interference with patient care, and inconvenience to our patients and their visitors, the following rules will apply to solicitation and distribution of literature on hospital property.

##### *Outsiders*

Persons not employed by the hospital may not solicit or distribute literature on hospital property for any purpose at any time.

##### *Employees of the Hospital*

Employees may not solicit for any purpose during working time. Employees may not distribute literature for any purpose during working time or in working areas.

"Working time" includes the working time of both the employee doing the solicitation or distribution and the employee to whom it is directed. Questions as to the meaning of "working time" or "working areas" should be directed to the Administrator's office.

The General Counsel maintains that the foregoing rule that precludes "outsiders" from soliciting or distributing literature has not been followed in certain respects, and that the Hospital is discriminating against union solicitation by prohibiting such activity while permitting other forms of solicitation or distribution by "outsiders" in an area adjacent to the Hospital's public cafeteria.

The Respondent has an established practice of permitting various entities, on a regularly scheduled basis, to set up tables or booths in the hallway adjacent to the cafeteria, from which nonemployees solicit and sell goods and services. Many of the entities are intimately related to the fringe benefits that the Hospital offers its employees. Thus, as part of its fringe benefit package, the employees are offered their choice of several tax sheltered annuity plans, known as Section 403(b) plans. Nonemployee representatives of these plans are permitted to set up tables, and distribute literature and answer employees' questions in order to sell such annuities to the employees. Similarly, the Hospital gives its em-

ployees their choice of various health care providers, and these entities are permitted to solicit and sell their products from tables near the cafeteria, and to answer questions that employees may have about specific problems regarding their health insurance. Also, medical textbooks are offered for sale by vendors as a part of the Hospital's practice of educational enhancement.

Certain other services, apparently directed only to employees, are neither part of the Respondent's fringe benefit package nor intimately related to the enhancement of health care. Thus, the Stanford Federal Credit Union sometimes sets up a table in order to solicit credit union membership and offer employees a wide range of financial products similar to those offered by any bank or savings and loan organization. Similarly, a representative of child and family services sets up a table outside the cafeteria on the third Wednesday of every month. This representative answers employees' questions regarding child care, distributes literature regarding child care resources, and may refer potential clients to various child care agencies both on and off the Stanford University campus. Finally, on the second Monday of each month, a representative of an insurance company, California Casualty, sets up a table near the cafeteria and sells insurance. Thus, employees are solicited to change their current insurance carrier and contract with California Casualty for a wide range of insurance products that any insurance company would customarily sell: automobile, homeowners, renters, mobile homes, vacation homes, rental property, and other products.

In addition, various nonemployee vendors are permitted to set up tables or booths near the cafeteria and sell their products to employees and the general public for profit. In this regard, a flower vendor with the business name "Not Just Roses" sells flowers on the first and third Friday of every month. Similarly, two jewelry vendors sell jewelry items, and a clothing vendor known as "Scrub Duds" sells colorful clothing outfits, known as scrub outfits, which pediatric nurses customarily wear but which may be worn by others as well. The foregoing vendors are authorized to sell their wares by the Packard employee activity committee (PEAC), a committee composed of employees and hospital administrators; the highest ranking official on this committee is the Respondent's director of human resources. In return for being permitted to sell their products, the vendors contribute between 10 and 15 percent of their gross receipts to the PEAC.

A considerable portion of the record evidence involves events in the summer and fall of 1991, at the time when the Respondent first opened. During this period of time there was an organizational campaign by the Committee for Recognition of Nursing Achievement (CRONA), the labor organization that currently represents the nurses at both Stanford Hospital and, in a separate unit, at the Respondent's facility. The two hospitals are at the same location; they are physically attached to each other, and even share certain health care units. The evidence shows that during the period in question in 1991, the Respondent's administration cooperated with CRONA representatives and permitted certain organizational or informational meetings to be held by nonemployees on hospital premises. The Respondent maintains that to the extent it did cooperate with CRONA by permitting union meetings, it did so because a majority of its nurses were hired directly from Stanford Hospital, and these nurses had been represented by CRONA for over 30 years; thus, in es-

<sup>1</sup> All dates or time periods hereinafter are within 1994 unless otherwise specified.

sence, the organizational campaign among the Respondent's nurses appeared to be a mere formality, and the certification of CRONA appeared to be a foregone conclusion. Nevertheless, the Respondent proffered evidence to the effect that it continued to attempt to preclude nonemployee representatives of CRONA from soliciting employees in the hallway outside the cafeteria. The General Counsel has presented contrary evidence in order to show that the Respondent had a past practice of permitting nonemployee members of a labor organization to set up a table outside the cafeteria and solicit employees during an organizational campaign.

### C. Analysis and Conclusions

From the foregoing, it is clear that the Respondent has not adhered to the no-solicitation and distribution policy contained in its supervisors' manual. Thus, the rule precluding "outsiders" from "solicit[ing] or distribut[ing] literature on hospital property for any purpose at any time" has not been applied to a variety of vendors who have been permitted to profit from the sale of flowers, jewelry, and clothing to employees and the general public as they approach the Respondent's cafeteria. The fact that such vendors are authorized to sell their wares by the Packard employee activity committee, and must remit a percentage of their proceeds to the PEAC in exchange for such permission, does not negate the fact that the plain language of the rule that the Respondent seeks to enforce specifically precludes such activity by nonemployees.<sup>2</sup>

Similarly, the Respondent, on a regular basis, permits the sale of all types of banking and insurance products to its employees by "outsiders." These products are not a part of the employees' regular benefit package. Clearly, by granting such permission the Respondent is not adhering to the plain language of its rule that it seeks to enforce against the Union.<sup>3</sup>

The Respondent argues in its brief that the nonemployee vendors and representatives, of the other aforementioned businesses are "agents" of the Respondent, acting on its behalf, and therefore are not "outsiders" within the meaning of the Respondent's rule. Apparently, the Respondent considers an agent to be anyone with whom it has a voluntary relationship, and an outsider to be anyone who is not an agent. Respondent's argument is without merit.

From the foregoing, I conclude that the Respondent has enforced its ban on union solicitation in a discriminatory manner. Such conduct is clearly violative of Section 8(a)(1) of the Act. *Ameron Automotive Centers*, 265 NLRB 511 (1982), and cases cited therein.<sup>4</sup> Thus, in *Ameron*, the administrative law judge, stated:

<sup>2</sup>The record evidence shows that the Union was prepared to make a contribution to the PEAC, if necessary, in order to obtain permission to set up a table and solicit employees.

<sup>3</sup>Indeed, a union contract may be reasonably characterized as a form of insurance protection that labor organizations are in business to provide.

<sup>4</sup>It appears unnecessary to analyze the abundant evidence regarding the 1991 CRONA organizational campaign, and make the necessary credibility resolutions in connection therewith, as such matters are remote in time and, under the circumstances, appear to be of limited evidentiary value.

From the foregoing it is apparent and I find that Respondent's application of their no-solicitation rule was on a selective basis . . . . It is well established that disparate application of even an otherwise valid no-solicitation proscription, so as to preclude union organizational solicitation while permitting or sanctioning other solicitation, violates Section 8(a)(1) of the Act.

### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) of the Act by discriminatorily enforcing its no-solicitation and no-distribution rule so as to preclude the Union from engaging in solicitation and distribution of materials in the hallway outside the Respondent's public cafeteria.

4. The unfair practices set forth in paragraph 3 above constitute unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

### THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Moreover, the Respondent shall be required to post an appropriate notice, attached hereto as "Appendix."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

### ORDER

The Respondent, Lucile Salter Packard Childrens' Hospital at Stanford, its Palo Alto, California, officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with employees' Section 7 rights by discriminatorily enforcing its no-solicitation and no-distribution rule.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at the Respondent's facilities copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, after being duly signed by the Respondent's representative, shall be posted by it immediately upon receipt thereof, and be

<sup>5</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>6</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

maintained by the Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of The United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to permit nonemployee representatives of American Federation of State, County and Municipal Employees, District Council 57, American Federation of State, County and Municipal Employees, AFL-CIO, or any other labor organization, to solicit employees and distribute material in the hallway outside the cafeteria in the same manner and under the same conditions as we permit other entities to engage in similar activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

LUCILE SALTER PACKARD CHILDRENS' HOSPITAL AT STANFORD